SUPREME COURT, U. S.

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MICHAEL RODAK, JR., C

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-160

RICHARD E. WILES, JR. and KAREN B. WILES

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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August, 1974

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COMMISSIONER OF INTERNAL REVENUE,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioners Richard E. Wiles, Jr. and Karen B. Wiles respectfully pray that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Tenth Circuit entered in the above case on June 26, 1974.

OPINIONS BELOW

The opinion of the United States Tax Court is reported at 60 T.C. 56. It is reproduced in Appendix B to this Petition (pp 37 to 75 infra). The opinion of the Court of Appeals for the Tenth Circuit has not yet been reported. It is reproduced in Appendix A to this Petition (pp 23 to 36 infra).

JURISDICTION

The judgment of the Court of Appeals which is sought to be reviewed was entered on June 26, 1974. A timely Petition for Rehearing and Suggestion for Rehearing In Banc was denied on July 25, 1974 (Appendix C, pp 77 to 78 infra). The jurisdiction of this Court is invoked under 26 U.S.C. § 7482(a) and 28 U.S.C. § 1254(1).

QUESTION

Petitioner Richard E. Wiles, Jr. and his wife, Constance, entered into a property settlement agreement which was incorporated in a Kansas

divorce decree. Pursuant to that agreement Petitioner delivered to Constance shares of corporate stocks having a market value of $506,452.21. The tax basis of the stocks in Petitioner's hands was $83,169.65. The question is whether Petitioner realized a gain from this delivery of stocks upon which he became liable to pay a federal income tax.

STATUTES INVOLVED

This case involves Title 26 United States Code (Internal Revenue Code of 1954) § 1001(a), (b) and (c), and § 1002; and Kansas Statutes Annotated § 60-1610 (b), (c) and (d). These sections are reproduced in full in Appendix D, pp 79 to 81 infra.

STATEMENT OF THE CASE

All of the facts in this case have been fully stipulated (R. 45-54).

After almost 17 years of marriage Constance, the former wife of Petitioner, Richard E. Wiles, Jr. (hereinafter called "Taxpayer"), sued Taxpayer for divorce in Kansas (R. 46) where the parties resided (R. 50). Section 60-1610 of Kansas Statutes Annotated (pp 80 to 81 infra) provided that a decree of divorce shall divide all the property of the parties whether owned by either spouse prior to marriage, acquired by either spouse in his or her right after marriage or acquired by their joint efforts, in a just and reasonable manner; that such decree may award to either party an allowance for future support denominated as alimony; and that if the parties have entered into a separation agreement which the Court finds valid, just and equitable it shall be incorporated in, and the matters settled

thereby confirmed in the divorce decree.

Faced with this statute, the parties negotiated for the purpose of settling their property rights (R. 50), each of them having substantial properties in his individual name (R. 47-49).

In the course of these negotiations Taxpayer and Constance agreed that neither party would be required to pay the other any alimony and they adopted a formula for attempting to reach an agreement with respect to the division of their property which was as follows: first they would attempt to agree upon the aggregate value of all of their property; this amount would then be divided by two; and the resulting amount would be the aggregate value of the property which each of them would receive (R. 51).

This plan of negotiation was carried out. The value of the property in Taxpayer's name exceeded the value of the property in Constance's name and a separation agreement was entered into

providing for the division of their property which included, among other things, the delivery by Taxpayer to Constance of corporate stocks having a market value of $506,452.21. On the same day Taxpayer and Constance were divorced and the separation agreement was incorporated in and made a part of the divorce decree (R. 52 and Exhibit 5-E). Thereafter the terms of the agreement were carried out (R. 53). Taxpayer contended that he realized nothing from the delivery of said stocks to Constance and returned no income therefrom on his 1966 income tax return. Respondent, however, contended that Taxpayer realized $506,452.21 from this delivery of stocks to Constance and therefore experienced a taxable gain of $423,282.56 being the excess of $506,452.21 over Taxpayer's basis in the stocks. Accordingly, Respondent determined a 1966 income tax deficiency on the part of Taxpayer with respect to that transaction (R. 54).

Taxpayer timely filed suit in the United States Tax Court for a re-determination of this deficiency where a majority opinion upheld the Commissioner. However, a dissenting opinion by three judges held to the contrary (pp 37 to 76 infra).

The case was then appealed to the United States Court of Appeals for the Tenth Circuit where the decision of the Tax Court was upheld.

Taxpayer's wife, Karen, is joined because she and Taxpayer filed a joint return for the year in question.

The basis for Federal jurisdiction in the Tax Court is under 26 U.S.C. § 7482.

REASONS FOR GRANTING THE WRIT

I

The Decision of the Court of Appeals Conflicts with Applicable Decisions of the Supreme Court

A.

The decision of the Court of Appeals misconstrues United States v. Davis, 370 U.S. 65(1962).

The facts of Davis are similar to the case at bar except that it arose in Delaware. There, as here, a husband transferred appreciated stock to his wife pursuant to a property settlement agreement which was incorporated in their divorce decree. The Government contended there, as here, that the transfer of stock was in exchange for the release of an independent legal obligation (370 U.S. at 69) and was therefore taxable under 26 U.S.C. § § 1001 and 2.[1] The Supreme Court

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1. These sections provide that if a taxpayer exchanges property-X for property-Y and his basis in property-X is less than the fair market value of property-Y, the difference is treated as taxable gain.

found that under Delaware law a wife's property rights upon divorce "do not differ significantly from the husband's obligation of support and alimony. They all partake more of a personal liability of the husband than a property interest of the wife" (370 U.S. at 70); that the transfer of stock was therefore made in exchange for the release of this personal obligation; that the value of the release was the appreciated value of the stock; and that therefore the husband experienced a taxable gain from this exchange.

Thus, under Davis taxability depends upon whether under state law, a transfer of appreciated property upon divorce was in exchange for the release of an independent personal obligation.

The Court of Appeals purported to follow Davis but misconceived the rule thereof in stating, with respect to the case at bar (p 25 infra):

> "The issue is whether the transfer of the appreciated property was a taxable event, or a division of property between co-owners."

The court then went on to find that under Kansas law, Taxpayer's wife was not a co-owner of the transferred stocks, and that because thereof the transfer was taxable.

The co-ownership issue was injected into the Davis case by the taxpayer who took the position that the transfer in that case was comparable to a non-taxable division of property between co-owners. Davis held that under Delaware law such was not the case. But Davis did not lay down the flat rule that all transfers by husband to wife upon divorce are taxable unless the wife is a co-owner of the transferred property. Only gains from sales or exchanges are taxed under § § 1001 and 2. While a transfer of co-owned property would clearly not be taxable, a transfer of property which is not co-owned would be taxable only if it is a sale or exchange from which a gain is realized. Thus, simply finding, as the Court of Appeals did, that the transferred property was

not co-owned by the transferee, does not in itself establish taxability.

If the properly construed rule of the Davis case were applied to the facts and law of the case at bar, the delivery of stocks by Taxpayer to his wife would clearly be non-taxable. Under K.S.A. § 60-1610(b) a Kansas court, in decreeing a divorce, is required to divide all of the property of both husband and wife "whether owned by either spouse prior to marriage, acquired by either spouse in his or her own right after marriage, or acquired by their joint efforts, in a just and reasonable manner" (p 80 infra). This statutory provision is separate and apart from § 60-1610(c) which provides that the court "may award to either party an allowance for future support denominated as alimony" (p 80 infra). Under Kansas law, therefore, a wife has an in rem claim against property of the husband (and vice versa) which is separate and apart from any personal

claim against the husband for support.[2]

The Court of Appeals recognized this to be the Kansas law by stating (p 28 infra):

> "The [Kansas] divorce laws compel the Courts to marshal all of the parties' property, regardless of ownership or acquisition, and to divide it in a just and reasonable manner. K.S.A. § 60-1610(b). Accordingly, a wife may expect to receive a certain share of her husband's property upon divorce. This expectation is independent of any right to alimony." (emphasis added)

In the case at bar Taxpayer and his wife agreed that neither would pay alimony to the other and that there would be a 50-50 division of all their property. The stocks in question were delivered in carrying out this property division. The transfer was therefore solely on account of the wife's in rem claim against the property, and was not in exchange for a release of personal

2. Kansas Courts have uniformly held that division of property and alimony are entirely separate in Kansas. Cummings v. Cummings, 26 P.2d 440 at 442 (1933); Garver v. Garver, 334 P.2d 408 at 410 (1959); Drumond v. Drumond, 495 P.2d 994 at 998 (1972).

liability, and under a proper construction of Davis, was not a taxable transaction.

B.

The decision of the Court of Appeals is in conflict with Collins v. Commissioner, 393 U.S. 215 (1968) which involved an Oklahoma divorce. Here again a husband delivered appreciated stock to his wife pursuant to a property settlement agreement. The case was appealed from the United States Tax Court to the Tenth Circuit Court of Appeals where that court held the transfer taxable, 388 F.2d 353 (1968). The case went to the Supreme Court on certiorari (393 U.S. 215) where the appellate court's judgment was vacated and the case remanded for further consideration in light of the opinion of the Supreme Court of Oklahoma in Collins v. Oklahoma Tax Commission, 446 P.2d 290 (1968). There the Oklahoma Court had, in the meantime, held that under the Oklahoma property settlement statute (12 O.S. 1961

§ 1278) the wife in Collins had a species of common ownership in the transferred stock. Upon rehearing the Tenth Circuit Court of Appeals reversed its original opinion and held the transaction non-taxable, 412 F.2d 211 (1969).

The above Oklahoma statute required the Oklahoma court on divorce to divide the jointly acquired property of the parties and the transferred stock was found to have been jointly acquired. The law and facts of Collins being, in effect, almost identical to those of the case at bar, the Court of Appeals should have followed Collins and held the transfer in the case at bar non-taxable.

II

This Case Involves an Issue of Exceptional Importance

These proceedings are of great importance to Taxpayer since the tax in controversy exceeds $109,000. Furthermore, the decision of the Court of Appeals will work a great injustice upon Taxpayer. Taxpayer and his wife agreed that each would have one-half of the marital estate. The subject transaction carried out that division. For Taxpayer to be required to pay out of his half, a large tax on the appreciation in his wife's half of the estate would defeat the 50-50 division, oppress the Taxpayer, and grant an undeserved windfall to his wife.

But, in addition, these proceedings involve a question of exceptional importance to all citizens of Kansas who will hereafter be involved in divorce. Under K.S.A. § 60-1610 the Kansas courts

must divide all the property of each spouse.[3] Thus all the property of every person facing divorce in Kansas, be it wife or husband, is subject to possible mandatory re-assignment. The impact of the decision of the Court of Appeals upon negotiations of Kansas property settlements, and the deliberations of Kansas courts with respect thereto, is therefore far reaching. To arrive at a fair division of property between the spouses under the decision of the Court of Appeals, the income tax effect of each proposed transfer of property from husband to wife and from wife to husband must be calculated and compensated for, requiring the delving into wide areas of collateral facts and the use of mathematical formulas not otherwise called for.

3. Under Kansas law "All property, no matter what the state of the title or its source, is put into a common pot and divided by the court 'in a just and reasonable manner'". Hopson, Divorce and Alimony Under the New Code, 12 Kan. L. Rev. 27 at 41 (1963); "Unlike the old code, upon divorce all property is now thrown into a single pot and divided as the judge sees fit". Berenson, 17 Kan. L. Rev. 369 (1969).

III

Further Supreme Court Guidance is Needed in this Field

The misconception of Davis has troubled and is continuing to trouble courts in the Tenth Circuit.

In the series of Collins cases described above, the obvious unfairness resulting from the misconceived rule was avoided by the Oklahoma Supreme Court in holding that the Oklahoma statute gave the wife "a species of common ownership" in the transferred property (446 P.2d at 295). This state decision, while achieving ultimate justice in Collins, created other troubles. In Sanditen v. Sanditen, 496 P.2d 365 (1972) a husband made gifts to others than his wife, and died. His wife then sued the donees claiming a vested interest in the gifts based on Collins. The Oklahoma court held against the wife on this issue, finding that in Oklahoma a wife does not have a

vested interest in her husband's property until action for divorce is commenced. In McDaniel v. Oklahoma Tax Commission, 499 P.2d 1391 (1972) a husband, as a step in estate planning, gave property to his wife, but did not pay the Oklahoma gift tax claiming that, under Collins, his wife was a co-owner. There again the Oklahoma court held that the wife's interest in the property did not vest until divorce, and that the transaction was taxable.

The Court of Appeals recognized the trouble in Oklahoma, stating: "In any event the Oklahoma position is still troublesome . . . . The Oklahoma law would seem to be in a state of flux." (pp 31-32 infra)

Colorado courts are presently having troubles with this question. In Imel v. United States, U.S. Dist. Ct. Colo. Civil Action No. C-3264, 73-2 USTC No. 9617 (1973) a husband and wife, upon divorce, agreed that 50% of the husband's property

would be transferred to the wife. This was done and the Government claimed a capital gains tax thereon. The Federal District Court, in a long Memorandum Opinion reviewed the case of Pulliam v. Commissioner, 329 F.2d 97 (1964) where the Tenth Circuit had held such a transfer to be taxable under Colorado law; fully reviewed all of the Collins cases; recognized the similarity of law in Colorado and Oklahoma; and concluded:

> "And so, present Tenth Circuit law is that an Oklahoma wife has 'a species of common ownership' in property accumulated by husband and wife during their marriage, while a Colorado wife has no 'species of common ownership'. Accordingly, the Oklahoma husband owes no federal capital gain tax on property transferred from his name to that of his wife under a property settlement agreement or award, but a Colorado husband owes the federal tax".

Finding that the Colorado Supreme Court had not decided this issue, the Federal District Court certified the question to the state court. In January, 1974, the Colorado Supreme Court handed

down its decision (In re Questions Submitted by U.S. Dist. Ct. in Imel v. U.S., 571 P.2d 1331) stating at page 1334:

> "We answer in the affirmative that, under Colorado law, the transfer involved here was a recognition of a 'species of common ownership' of the marital estate by the wife resembling a division of property between co-owners. We answer in the negative whether the transfer more closely resembles a conveyance by the husband for the release of an independent obligation owed by him to his wife."

Based on this state court ruling, the Federal District Court held that the Imel transfer was nontaxable. See that Court's opinion in Appendix E, pp 82-90 infra. The case is now being appealed by the Government to the Tenth Circuit Court of Appeals.

The above clusters of litigation clearly demonstrate the problems arising in the Tenth Circuit and the need for further guidance and clarification from the Supreme Court in this field.

The obsession of the courts in attempting to define the wifes' prior interests in property

transferred on divorce, seems to have diverted their attention from the basic law creating the tax. That law (§ § 1001 and 2) only taxes gains from sales or exchanges. Therefore the crucial question in these cases is whether there is a sale or exchange. If property is transferred for a release of a personal claim there is an exchange. If property is transferred because of a claim against the property, there is no sale or exchange, regardless of what the transferee's interest in the property may be.

Under the correct interpretation of Davis (and the only logical one when the tax law is kept in mind), a transfer of appreciated property to a wife (or husband) upon divorce will be taxed if the transfer is for a release of a personal obligation of the transferor, and will not be taxed if the transfer is in satisfaction of transferee's in rem claim to the transferred property.

This proper interpretation removes the need for determinations of ownership and the resort to

narrow distinctions and refinements with respect thereto, to achieve justice; and would permit federal courts to determine this federal tax issue, fairly and equitably, without the need of certifying questions to state courts.

CONCLUSION

For the reasons aforesaid it is respectfully prayed that a Writ of Certiorari be granted to review the opinion and judgment of the United States Court of Appeals for the Tenth Circuit.

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August 1974

ATTORNEY FOR PETITIONERS

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

MAY TERM, 1974

RICHARD E. WILES, JR. and KAREN B. WILES, Petitioners-Appellants,	)	
v.	)	No. 73-1677
COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.	)	

APPEAL FROM THE UNITED STATES TAX COURT

John H. Foard for Petitioners-Appellants.

Arthur L. Bailey, Attorney, Tax Division, Department of Justice (Scott P. Crampton, Assistant Attorney General, and Meyer Rothwacks and Grant W. Wiprud, Attorneys, Tax Division, Department of Justice on the brief), for Respondent-Appellee.

APPENDIX A

Before PICKETT, BREITENSTEIN and BARRETT, Circuit Judges.

BREITENSTEIN, Circuit Judge.

In this federal income tax case the question is whether the taxpayer realized a taxable gain upon the transfer of certain appreciated personal property to his former wife under a property settlement agreement incorporated in a Kansas divorce decree. The Tax Court, with three judges dissenting, upheld the contention of the Commissioner that the gain was taxable. See 60 T.C. 56. Taxpayer appeals.

The facts are stipulated. Taxpayer was married to Constance who sued him for divorce in a Kansas court. Taxpayer and Constance negotiated to settle their property rights, and reached a voluntary agreement whereby neither would claim alimony, and the total value of all property held by each would be equally divided. Because the value of property in taxpayer's name exceeded

that in Constance's name, taxpayer agreed to transfer property in his name, corporate stocks, having an assigned value of $550,000, to Constance to accomplish the equal division of their combined holdings. The agreement was made a part of the divorce decree. The taxpayer's aggregate base for the transferred property was $83,169.65. The Commissioner assessed a deficiency on the basis that the transaction was a taxable event resulting in a gain from the exchange of property, see § 1001(c) and 1002 of the Internal Revenue Code of 1954, and the Tax Court affirmed him. The amount in controversy is $109,650.54. Taxpayer's present wife is joined because she and her husband filed a joint return for the year in question.

The issue is whether the transfer of the appreciated property was a taxable event, or a division of property between co-owners. United States v. Davis, 370 U.S. 65, was concerned with

a Delaware divorce and a transfer of individually owned appreciated securities by the husband in satisfaction of all claims against him. The Court recognized that state law would affect the federal tax question because state law determined the substantive rights of the parties in the transferred property during marriage. Ibid. at 71. In Delaware the wife had only certain statutory marital rights in her husband's property. These were her rights to intestate succession, dower, and a share of his property upon divorce. Ibid. at 66. She had no interest in the management or disposition of her husband's personal property and she had to survive him to share in his intestate estate. Ibid. at 70. On dissolution of the marriage she shared in the property only to the extent which the court deemed reasonable after consideration of relevant factors including her needs, age, health, and the number of children. Ibid. at 70. The Court said that "the inchoate rights granted a wife in her

husband's property by the Delaware law do not even remotely reach the dignity of co-ownership." Ibid. at 70. We recognized the Davis decision in Pulliam v. Commissioner of Internal Revenue, 10 Cir., 329 F.2d 97, cert. denied 379 U.S. 836. If the state-created rights result in co-ownership of the property, the transfer on divorce is a division of property, non-taxable to the transferor.

We turn to the law of Kansas. In that state, a wife has a right to intestate succession if she survives her husband. K.S.A. § 59-504. She also is entitled to one-half of all her deceased husband's realty, the sale of which she did not consent to during marriage. K.S.A. § 59-505. This right is somewhat analogous to dower. The two mentioned rights are all that a wife has in her husband's property during marriage except certain specified rights in exempt property. See K.S.A. § § 58-312 and 60-2301. Although the Kansas Supreme Court has recognized that these

rights possess some elements of a property interest, they rise no higher than inchoate rights contingent upon the wife's survival. Se In re Williams' Estate, Kan., 150 P.2d 336, 338; Bates v. State Sav. Bank, Kan., 18 P.2d 143, 145; and Murray v. Murray, Kan., 170 Pac. 393, 394.

Just as the wife's inchoate rights vest upon her husband's death, the filing of a divorce suit confers additional rights on the wife. The state divorce laws compel the courts to marshall all of the parties' property, regardless of ownership or acquisition, and to divide it in a just and reasonable manner. K.S.A. § 60-1610(b). Accordingly, a wife may expect to receive a certain share of her husband's property upon divorce. This expectation is independent of any right to alimony. See K.S.A. § 1610(b) and (c), and D. Hopson, Divorce and Alimony Under the New Code, 12 Kan. L. Rev. 27, 41.

The division of the property is wholly

within the discretion of the trial court. Harrah v. Harrah, Kan., 409 P.2d 1007, 1011; Zeller v. Zeller, Kan., 407 P.2d 478, 485. In the exercise of its discretion, it considers the source of the property, the contribution of each party, earning capacity, fault, needs, ages, and length of marriage. Harrah, 409 P.2d at 1011; Folk v. Folk, Kan., 455 P.2d 487, 489; and Saint v. Saint, Kan., 411 P.2d 683, 688. These factors are inconsistent with the idea of co-owned property. If the wife were a co-owner in Kansas, her interest in the property to be divided would be based on more than a right to a "just and equitable" share therein. See Garver v. Garver, Kan., 334 P.2d 408, 410; and Cummings v. Cummings, Kan., 26 P.2d 440, 442.

The Davis test depends on the transferee's rights in the property during marriage. 370 U.S. at 70. One commentator, speaking of Kansas law, has said that "[a] division of the couple's jointly owned property is to be distinguished for

federal tax purposes from a division of 'jointly acquired' property held solely in the name of the husband in which the wife has only an inchoate interest." B. Moore, Federal Tax Aspects of Divorce, 35 J.K.B.A. 175, 209 n. 21. Indeed, Cofield v. Koehler, D.C.Kan., 207 F.Sup. 73, appeal dismissed, 10 Cir., 311 F.2d 221, holds that a transfer of jointly acquired and owned bonds incident to divorce is not a taxable event. In the case at bar there was no joint ownership, and the rights of the wife in the husband's property were inchoate.

Although we believe that under Davis the Kansas law is controlling and defeats the taxpayer's claim, we cannot ignore the Collins cases on which he relies. These involved Oklahoma law. In Collins v. Commissioner of Internal Revenue, 10 Cir., 388 F.2d 353, we held that a transfer of property pursuant to a settlement was, for federal income tax purposes, a disposition of property

and a taxable transaction. Ibid. at 357-358. Thereafter, in Collins v. Oklahoma Tax Commission, Okl., 446 P.2d 290, 295, the Oklahoma Supreme Court held that property acquired during coverture is "a species of common ownership." The United States Supreme Court vacated our judgment and remanded the case for consideration in the light of the mentioned decision of the Oklahoma Supreme Court. 393 U.S. 215. On remand we held that under the Oklahoma decision, the transfer was non-taxable. 412 F.2d 211, 212. The Oklahoma situation is pertinent because the Oklahoma law was adopted from the law of Kansas. Vanderslice v. Vanderslice, Okl., 159 P.2d 560, 562. In any event the Oklahoma position is still troublesome. In Sanditen v. Sanditen, Okl., 496 P.2d 365, a case involving a gratuitous transfer by a husband of property jointly acquired during coverture, the court held that a wife has no vested rights in the property subject to division.

Vesting occurs by virtue of the divorce action, and not the marriage relationship. 496 P.2d at 367. See also McDaniel v. Oklahoma Tax Commission, Okl., 499 P.2d 1391, 1393-1394. The Oklahoma law would seem to be in a state of flux.

The situation in Colorado must also be mentioned. In Pulliam v. Commissioner of Internal Revenue, 10 Cir., 329 F.2d 97, cert. denied 379 U.S. 836, we held that a taxable capital gain resulted from a divorce decree that acted as a conveyance from husband to wife of described property. In our first Collins decision we said that we saw no controlling distinction between Oklahoma law and Colorado law and followed the Pulliam decision. 388 F.2d at 357. The problem did not stay buried in Colorado. Imel v. United States, D.C.Colo., civil action No. C-3264, was an action for refund of a capital gains tax paid on appreciated property transferred to a wife under a divorce settlement agreement. As

permitted by the Colorado Appellate Rules, 21.1, see also Lehman Brothers v. Schein, ____U.S.___, 42 LW 4603, the federal court certified to the Colorado Supreme Court, see In re Questions Submitted by the United States District Court, Colo., 517 P.2d 1331, the question, Ibid. at 1332:

> "Under Colorado law, is such a transfer a recognition of a 'species of common ownership' of the marital estate by the wife resembling a division of property between co-owners, or does the transfer more closely resemble a conveyance by the husband for the release of an independent obligation owed by him to the wife?"

In answer the state supreme court said, Ibid. at 1334:

> "We answer in the affirmative that, under Colorado law, the transfer involved here was a recognition of a 'species of common ownership' of the marital estate by the wife resembling a division of property between co-owners. We answer in the negative whether the transfer more closely resembles a conveyance by the husband for the release of an independent obligation owed by him to the wife."

The Colorado Supreme Court reviewed the Collins series of cases and commented that it perceived no material distinction between the statutes of Colorado and those of Oklahoma considered in the Collins cases. Ibid. at 1334. We are not told what the future course of the Imel litigation will be.

The Oklahoma and Colorado decisions are not conclusive here. They are noted in recognition of the disparities which exist in the application of federal tax statutes to transactions occurring in the states which compose the Tenth Circuit. We are bound by Davis which comments that although Congress has alleviated disparities in many areas "in other areas the facts of life are still with us." 370 U.S. at 71. Davis requires us to follow Kansas law. We are convinced that under the pertinent Kansas statutes and decisions the wife has no vested co-ownership in property of the husband during marriage.

Consequently, the transfer of some of that property pursuant to a divorce settlement was a taxable event.

A few matters remain to be mentioned. The government says that the wife's waiver of alimony in the settlement agreement, and the provision of the subsequent divorce decree that the settlement covers "all marital rights and obligations," establish that the transfer was in exchange for an independent legal obligation, and hence a taxable event. In Davis the settlement was of "any and all claims and rights against the husband whatsoever," 370 U.S. at 67, and the Court held that decision rested on whether under state law they were co-owners. 370 U.S. at 70-71.

The taxpayer asserts that the Commissioner improperly has taken inconsistent positions by asserting a tax claim against the wife on the basis of the settlement transaction. The Commissioner replies that this is an administrative

practice for the protection of the revenues. See Estate of Goodall v. Commissioner of Internal Revenue, 8 Cir., 391 F.2d 775, 782-783, cert. denied 393 U.S. 829; cf. Commissioner of Internal Revenue v. Southwest Exploration Co., 350 U.S. 308, 309 n 1. We are confident that the Commissioner will not attempt to collect double taxes and, if he does, the liability of the divorced wife can then be considered.

Affirmed.

60 T. C. No. 7

UNITED STATES TAX COURT

RICHARD E. WILES, JR. and KAREN B. WILES, Petitioners v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 6186-71. Filed April 9, 1973.

Petitioner and his wife, as Kansas domiciliaries, negotiated a property settlement in anticipation of their divorce providing, among other things, that petitioner would deliver to her sufficient shares of publicly traded stocks held by him which when added to other property transferred would equal in value $550,000. For this purpose they stipulated values per share for each stock. Kansas law requires upon divorce an equitable division of property of the marriage, regardless of legal title, either by decree or by private agreement subject to judicial supervision. Section 60-1610(b) and (d), Kan. Stat. Ann. (Supp. 1971). Held: Petitioner realized capital gain income upon the transfer of stocks. United States v. Davis, 370 U.S. 65 (1962). George F. Collins, Jr., 46 T.C. 461 (1966), affd. 388 F. 2d 353 (C.A. 10, 1968) followed.
Held further: The amount realized is the aggregate fair market value of the transferred stocks as of the date of the settlement agreement, since most of the burdens and benefits of ownership passed to the wife at that time.

John H. Foard, for the petitioners.

George T. Morse, III, for the respondent.

OPINION

TIETJENS, Judge: The Commissioner determined deficiencies in the income tax of Richard E. Wiles and his wife Karen B. Wiles as follows:

Year	Deficiency
1966	$120,536.95
1967	936.00
1968	3,302.68

Concessions were made by both parties and a Rule 50 computation will be necessary. We are asked to determine whether the transfer of appreciated stocks by petitioner Richard E. Wiles to his former wife was a taxable event, and if it was we are asked to determine what were the values of those stocks.

All of the facts are stipulated and are so found.

Petitioners Richard E. Wiles, Jr. and Karen B. Wiles, husband and wife, resided at Shawnee

Mission and at Santa Fe, New Mexico, respectively, at the time they filed their petition with this Court. Petitioners filed a joint Federal income tax return for 1966 with the district director of internal revenue at Wichita, Kansas. The taxable year 1966 is the only year remaining in dispute. Petitioner Karen B. Wiles is joined herein only by virtue of the filing of a joint return with her husband and further reference to petitioner shall refer only to Richard E. Wiles, Jr.

Petitioner married Constance Wiles, now known as Constance Noah, on July 30, 1948, which marriage continued until it was dissolved by a decree of divorce issued by the District Court of Johnson County, Kansas on May 27, 1966. The decree incorporated a property settlement agreement which had been negotiated by petitioner and Constance. There was no award of alimony denominated as such. In February 1967,

Constance married Brooks C. Noah, petitioner's brother-in-law and business partner.

Constance filed for divorce from petitioner in April 1965; the aforesaid district court thereupon temporarily restrained petitioner from transferring, encumbering or otherwise disposing of any of his or Constance's securities, other investments and property holdings pending trial. At the time suit was filed and during the time it was pending, both petitioner and Constance held title to substantial assets which were either brought into their marriage or acquired by their joint efforts during the marriage. Petitioner owned the following in his own right:

100 shares Atchison, Topeka & Santa Fe
78 shares Colgate-Palmolive Co.
299 shares Goodyear Tire & Rubber Co.
20 shares Kennecott Copper Corp.
50 shares Phillips Petroleum Corp.
42 shares Republic Steel Corp.
105 shares Standard Oil of New Jersey
74 shares First National Bank of Kansas City
67 shares Montgomery Ward & Co.
66 shares Great Northern Railway
400 shares Canada Dry Corp.

100 shares Otis Elevator
180 shares Sinclair Oil Corp.
100 shares Pullman, Inc.
19,408 shares Sunshine Biscuits, Inc.
300 shares General Motors Corp.
82 shares Martin-Marietta Corp.
$20,000 Municipal Bonds
One half-interest in a house in Minnesota

Petitioner also held title to the following jointly acquired property:

250 shares Heart Bowl, Inc.
600 shares Interstate 70 Corp.
7,000 shares Heart Drive-In Theatre, Inc.
3,000 shares First American Corp.
$80,000 note of a Mexican corporation, and a lease on that corporation's Mexican real estate
An airplane valued at about $35,000
Life insurance policies on said petitioner's life having a cash value of approximately $102,243
$6,500 (approximately) cash in banks.

Heart Bowl, Inc., Interstate 70 Corp., Heart Drive-In Theatre, Inc., and First American Corp. were businesses started by petitioner and Brooks C. Noah as early as 1950. Constance assisted in their development. These four corporations owned and operated Heart Drive-In Theatre in Kansas City, Missouri, the Yucca Drive-In Theatre in Santa Fe, New Mexico and the Heart Bowl in Kansas

City, Missouri.

During the pendency of the divorce suit, Constance owned the following in her own right:

110 shares American Telephone & Telegraph Co.
100 shares Baltimore Gas & Electric Co.
300 shares W. S. Dickey Clay Manufacturing Co.
250 shares Gas Service Co.
100 shares International Harvester
100 shares Simmons Co.
50 shares Standard Brands
100 shares Standard Oil of Indiana
55 shares Standard Oil of New Jersey
68 shares Sunshine Biscuits, Inc.
100 shares General Motors Corp.
214 shares C. A. Kiger Jewelry Co.
Aetna Life Insurance Co. annuity paying $302.12 per year
Pacific Mutual Insurance Company annuity paying $110.53 per year
Mutual of New York annuity paying $220.10 per year
Cameron crude oil lease paying $101.85 per year

At the same time she held title to the following jointly acquired property:

150 shares Interstate 70 Corp.
$50,000 Connecticut Mutual Life Insurance policy on petitioner's life
$100,000 Massachusetts Mutual Life insurance policy on petitioner's life
Cash in banks totalling approximately $9,000

1965 Buick Riviera automobile

Petitioner and Constance were joint tenants of a residence located in Mission Hills, Kansas and the household furnishings therein. Both petitioner and Constance were separate beneficiaries of family trusts established by certain of their respective ancestors.

In anticipation of the divorce, petitioner and Constance conducted several months' negotiations for the purpose of finally settling their marital property rights. Petitioner rejected one proposal; thereafter the parties agreed through their lawyers to divide their property equally between themselves, regardless of title ownership. To achieve this objective, they agreed to assign values to the assets that had no readily ascertainable fair market value, particularly the shares of the family corporations. As the property held in petitioner's name exceeded in value the property in Constance's

name, it was agreed that Constance would retain most of the property in her name and have transferred to her within 90 days of the agreement date sufficient property of petitioner to make up one-half of the negotiated total value of the combined assets.

A large part of the regularly traded stocks in petitioner's name were at that time pledged to the First National Bank of Kansas City to secure a total indebtedness of petitioner of approximately $384,000. Constance and petitioner agreed that delivery of these securities could be delayed until after petitioner had received a distribution out of the family trusts for petitioner mentioned above in late 1966.

The property settlement was memorialized in a printed Stipulation and Agreement drafted by Constance's attorney and was signed by petitioner and Constance on May 27, 1966. The divorce decree was entered on the same date.

The agreement provided that the agreed value of the regularly traded securities would be the average of the market high and low thereof from January 1, 1966 through May 21, 1966. The terms of the agreement were carried out by petitioner and Constance. On October 4, 1966, petitioner delivered the shares listed below; subsequent to the date of the Stipulation and Agreement but prior to October 4, 1966, Sunshine Biscuits, Inc. merged with American Tobacco Co., and consequently, Constance received on the delivery date 11,750 shares of the latter under the agreed upon formula for stock splits:

Stocks Delivered to Constance

Number of Shares	Issuer	Agreed upon Per Share Value	Average of the Market High & Low 5/27/66	Average of the Market High & Low 10/4/66
77	First National Bank of Kansas City	$ 78.75	77-1/4	73-3/4
67	Montgomery Ward & Company	34.125	35-3/81	24-1/2
66	Great Northern Railway	65.94	57	50-7/8
400	Canada Dry Corp.	28.75	25-3/16	20-3/8
116	Otis Elevator	54.76	48-3/8	35-1/2
180	Sinclair Oil Corp.	60.44	58-7/16	59-1/4
100	Pullman, Inc.	63.06	57-3/8	44-1/2
50	A. T. & S. Fe Railway	36.75	34-3/4	27-1/2
39	Colgate Palmolive	25.50	24-1/4	26-3/4
149	Goodyear Tire & Rubber Co.	45.94	48-1/8	45.812

Number of Shares	Issuer	Agreed upon Per Share Value	Average of the Market High & Low 5/27/66	Average of the Market High & Low 10/4/66
30	Kennecott Copper Corp.	$ 39.312	39-3/16	31-1/2
41	Martin Marietta Corp.	23.31	25-1/8	17.812
25	Phillips Petroleum Corp.	54.25	50-9/16	45-5/8
21	Republic Steel Corp.	41.69	38-9/16	31-3/4
52	Standard Oil of N. J.	77.50	73-9/16	61.812
150	General Motors Corp.	94.81	84-11/16	72-1/4
12	Proctor & Gamble	65.25	63-11/16	72
891	Warner Lambert (Common)	39.875	37-5/8	34.812
39	Warner Lambert (Preferred)	122.50	117-1/2	108
11,750	American Tobacco Co.	36.50	46-13/16	30

The aggregate agreed value of the above-listed securities was $549,997.85; the aggregate value of the same based on the average of the market highs and lows on October 4, 1966 was $453,365.18; the aggregate value of the same based on the average of the market highs and lows on May 27, 1966 was $506,452.21. Petitioner's aggregate tax basis in the securities was $83,169.65. The following table shows the amount of gain petitioner realized based on the three aforementioned aggregate values:

	Agreed Value	May 27 Value	Oct. 4 Value
Realized Gains	$466,828.00	$423,282.56	$370,186.53

The stocks which petitioner delivered to Constance on October 4, 1966 are the stocks upon which the Commissioner contends petitioner recognized capital gain income in 1966.

We are asked to determine whether the transfer of the appreciated stocks by petitioner to

his former wife pursuant to agreement constituted a taxable exchange under sections 1001 and 1002.[1] The United States Supreme Court in United States v. Davis, 370 U.S. 65 (1962), indicated that such a transaction is taxable unless it amounts to no more than a division of property by co-owners. Whether the recipient's interest in the property that was held by the husband and wife during the coverture rises to the dignity of co-ownership is a question of state law. United States v. Davis, supra. It is common knowledge that in most jurisdictions the financial arrangements that are concluded incidental to the termination of a viable marriage relationship arise from the husband's personal obligation to support his wife and not from the liquidation of any property interest of the latter. The major exception is to be found in community property

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1. All statutory references are to the Internal Revenue Code of 1954 unless otherwise stated.

states. In practice the ownership requirement announced in Davis is satisfied if the property interest in question is as large as the estate of a married person in his community property share. George F. Collins, Jr., 46 T.C. 461, 475 (1966).[2]

The law of Kansas provides that a decree of divorce, separate maintenance or annulment must be accompanied by an equitable division of property. Section 60-1610(b) of the Kansas Statutes states this requirement and it is the crucial authority cited to us by petitioner in support of his contention that in Kansas a married person is co-owner with his spouse of the property

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2. The history of the Collins case is discussed below.

jointly held during the marriage.[3] While the division of property may be made, as here, by agreement, section 60-1610(d), Kan. Stat. Ann., (Supp. 1971), such an agreement is subject to judicial supervision for fairness and thus must achieve the objectives of section 60-1610(b), supra. In addition to a property settlement, the court may award alimony. Section 60-1610 (c), Kan. Stat. Ann., (Supp. 1971).

To be sure there is a strong sentiment in

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3. Kansas Stat. Ann., section 60-1610(b) (Supp. 1971):

> (b) Division of property. The decree shall divide the real and personal property of the parties, whether owned by either spouse prior to marriage, acquired by either spouse in his or her own right after marriage, or acquired by their joint efforts, in a just and reasonable manner, either by a division of the property in kind, or by setting the same or a part thereof over to one of the spouses and requiring either to pay such sum as may be just and proper, or by ordering a sale of the same under such conditions as the court may prescribe and dividing the proceeds of such sale.

the Kansas decisions, which petitioner has amply explored on brief, that a divorced woman is entitled to something more than alimony. Indeed, the Kansas Supreme Court has analogized the marital relationship to a partnership, the termination of which is to be accompanied by a property division regardless of the fault of either party. Garner v. Garner, 184 Kan. 145, 334 P.2d 408 (1959). In Cummings v. Cummings, 138 Kan. 359, 26 P.2d 440 (1933), the same court stated that "a wife has an interest in property accumulated by husband and wife while the marriage relation existed." 26 P.2d at 442. See also Putnam v. Putnam, 104 Kan. 47, 177 P. 838 (Sup. Ct. 1919).

In spite of the foregoing, however, the question whether a wife's interest in the marital property is an ownership interest in the sense intended by Davis is still unanswered. In our opinion, section 60-1610(b), supra, does not resolve it. Rather, the purpose and effect of

the statute is to preclude vexatious litigation between husband and wife over title to property in connection with the termination of a marriage. As the quoted language from Cummings, supra, suggests, in Kansas prior to 1964, when section 60-1610(b) was enacted, a spouse was entitled to a division only of property jointly acquired during the marriage. Garner v. Garner, supra, at 411-12. The new law empowered the courts to throw all property owned by husband and wife, disregarding legal title, into a common pot and to divide the aggregate in a reasonable way. Zeller v. Zeller, 195 Kan. 452, 407 P.2d 478, 484-85 (1965). Thus, petitioner's reliance on section 60-1610(b), supra, is misplaced; but we doubt that he could have made a better case. The statute itself clearly shows that whatever the nature of a spouse's interest in the material property during the marriage, the value and extent of that interest cannot be ascertained until

the marriage is terminated. For all we know, the determination of what is in the terms of the statute a just and reasonable division of property may depend on criteria such as the wife's age and health, her independent wealth and living style at the time of divorce. Notwithstanding section 60-1610(b), it is still the law in Kansas that a wife must survive her partner in order to share in his intestate estate. Sections 59-504, 59-505, Kan. Stat. Ann. (1964). The foregoing considerations are the very same which led the United States Supreme Court in Davis to a conclusion adverse to the taxpayer. Absent a Kansas decision flatly stating that a property settlement in Kansas is a division of property between co-owners, we are unwilling to so hold today. We have been unable to find such a case.

Petitioner makes much of the decision of the Tenth Circuit Court of Appeals in Collins v.

Commissioner, 412 F.2d 211 (C.A. 10, 1969), in which the opposite conclusion was drawn about the Oklahoma statute corresponding to section 60-1610, supra.

However, since that decision, the Oklahoma Supreme Court has stated that:

> A wife does not have joint ownership in jointly acquired property * * * for if she did that would return this jurisdiction to a community property jurisdiction which was abolished by the Legislature in 1949. [Sanditen v. Sanditen, 496 P.2d 366, 367 (1972).]

And see McDaniel v. Oklahoma Tax Commission, 499 P.2d 1391 (1972); Wallace v. U.S. 307 F. Supp. 745 (1970) affd., 439 F.2d 757 (C.A. 8, 1971). Furthermore, we do not think that the Tenth Circuit's decision implies that its holding would be applied in a case involving Kansas law.

Collins was commenced in this Court, and in a reported decision we concluded that a property settlement under Oklahoma domestic relations law was an exchange giving rise to capital gain.

George F. Collins, Jr., supra, at 475. In the course of our opinion, we observed that the Oklahoma law was derived from Kansas law. 46 T.C. at 473. The latter was amended in 1964. The Tenth Circuit affirmed us, 388 F.2d 353 (C.A. 10, 1968), in an opinion in which the applicable law of yet another state, Colorado, construed in Pulliam v. Commissioner, 329 F.2d 97 (C.A. 10, 1964), certiorari denied, 374 U.S. 836 (1964), was analogized to the law of Oklahoma. However, ten months later the Oklahoma Supreme Court rendered an opinion, in the course of which the state court clearly established that under Oklahoma law the interest of a wife in property acquired by joint effort during marriage is "similar in conception to community property of community property states, and is regarded as held by a species of common ownership." Collins v. Oklahoma Tax Commission, 446 P.2d 290, 295 (1968). Collins petitioned

the United States Supreme Court for a writ of certiorari in the Federal tax case; it was granted and the case was remanded to the Tenth Circuit for further consideration in light of the decision of the Oklahoma Supreme Court. 393 U.S. 215 (1968). On remand, the Tenth Circuit reversed its prior decision and stated at page 212 that:

> Collins v. Oklahoma Tax Commission proclaims that in Oklahoma the wife is made "a part owner thereof," consequently there is no need to search state law for indications of other factors that might signify the nature of the wife's property interest.

The Commissioner observes on brief that Collins is the only case of this kind which he has lost where the law of a noncommunity property jurisdiction is involved.

Of course Collins v. Oklahoma Tax Commission, supra, did not settle a question of Kansas law. We doubt that it is even analogous, in view of the confinement of the Oklahoma statute to a

treatment of jointly acquired property. By contrast, the new Kansas statute can operate to divest a spouse of his several property, and in fact nearly all the securities petitioner delivered on October 4, 1966 has been brought into the marriage by petitioner and were not jointly acquired property. Moreover, as we indicated above, absent a Kansas decision speaking as clearly as Collins v. Oklahoma Tax Commission, supra, did, in regard to the Oklahoma law, we are compelled to engage in a process of characterization that is necessitated whenever a state law designed to achieve a local objective is pressed into the service of the Federal tax laws.[4] We have

4. If such a Kansas decision existed, we might be compelled to hold on this issue for the petitioners under Collins v. Commissioner, 412 F. 2d 211 (C.A. 10, 1969), and Jack E. Golsen, 54 T.C. 742 (1970) affd. 445 F. 2d 985 (C.A. 10, 1971). However, in cases which are appealable to other circuits, this Court will not necessarily be bound by the mere "tags" of State law to determine whether co-ownership between husband and wife existed. United States v. Davis, supra at 70.

reexamined the position this Court took in George F. Collins, Jr., 46 T.C. 461, affd. 388 F.2d 353 (C.A. 10, 1969), and believe the reasoning therein expressed is correct.

We turn next to the valuation issue.

There is no dispute as to petitioner's basis in the transferred stock. The parties disagree as to the amount realized. Petitioner contends that such amount should be derived from the average of the market high and low for each stock on the date of petitioner's performance of his part of the agreement, October 4, 1966. The Commissioner contends that the relevant valuation date is May 27, 1966, the date of the Stipulation and Agreement of property settlement.

Further, the Commissioner contends in the alternative that the agreed-upon values for the stocks in the Agreement should be used to compute the aggregate amount realized. In support of his latter contention, the Commissioner

observes that those values were arrived at by arms-length negotiations, which is undoubtedly true. However, all the stocks involved are publicly traded, and we cannot subscribe to the suggestion that petitioner and Constance could have valued those stocks more accurately than the highly organized markets in which they are traded daily. Indeed cases cited by the Commissioner state that the fair market value of a publicly traded stock is the average of the market high and low upon transfer. Leon R. Meyer, 46 T.C. 65, 106 (1966), affd. on this point, 383 F.2d 883 (C.A. 8, 1967); Batterman v. Commissioner, 142 F.2d 448 (C.A. 6, 1944), affirming a Memorandum Opinion of this Court.

It remains for us to determine whether the appropriate valuation date is October 4, 1966 or May 27, 1966. The Commissioner claims that Constance became the equitable owner of the shares earmarked for transfer to her as of the date of

the Agreement; he cites the fact that she bore the risk of depreciation in value of any of the stocks during the period between the signing of the agreement and the delivery date. We note that the agreement further provided that Constance was entitled to all dividends of every kind declared after May 27, 1966 on the shares finally delivered to her. The purpose of the substantial waiting period before the delivery was only to permit petitioner to obtain the release of some of the stock which was at that time pledged to secure an indebtedness of petitioner. While we recognize that petitioner also enjoyed some of the benefits and assumed some of the burdens of ownership during the pre-delivery period, nevertheless we think that the intent of the agreement was that Constance was to be the owner of the securities on May 27, 1966. Under authorities such as I. C. Bradbury, 23 B.T.A. 1352 (1931), affd. 78 F.2d 559 (C.A. 6, 1935),

Commissioner v. C.A. Sporl & Co., 188 F.2d 283 (C.A. 5, 1941), affirming 40 B.T.A. 828 (1939), and W. F. Marsh, 12 T.C. 1083 (1949), we decide this issue in the Commissioner's favor.

Reviewed by the Court.

Decision will be entered under Rule 50.

GOFFE, J., dissenting: I respectfully dissent from the opinion of the majority.

The result in the instant case is dictated by the application of the rationale of the Supreme Court in United States v. Davis, 370 U.S. 65 (1962). If the transfer from petitioner to his former wife pursuant to the property settlement agreement was in satisfaction of the termination of the marriage contract with its accompanying legal duty of support, the transfer is a taxable event. If, instead, the transfer is for the purpose of conveying title to property to

the name of the former wife in recognition of her property interest in property standing in petitioner's name, the transfer is a nontaxable division of property. Such determination is based upon the law of the state under which the divorce is granted. United States v. Davis, supra; George F. Collins, Jr., 46 T.C. 461 (1966); Collins v. Commissioner, 388 F.2d 353 (C.A. 10, 1968); Collins v. Commissioner, 412 F.2d 211 (C.A. 10, 1969).

The Davis case, supra, involved a divorce granted under Delaware law and the Supreme Court looked in vain for a property interest in the wife which was being recognized by the transfer of property by the husband.

The United States Court of Appeals for the Tenth Circuit, to which an appeal in the instant case would be made, endeavored to make the same inquiry in Collins v. Commissioner, supra, when the Commissioner appealed the decision of this

Court. It found no such property interest in the wife after its examination of the Oklahoma statutes and case law. Following the decision of the Supreme Court of Oklahoma in Collins v. Oklahoma Tax Commission, 446 P.2d 290 (Okla. 1968) the Court of Appeals re-examined the Oklahoma law and found that the wife did possess a property interest under state law and the transfer provided in the property settlement agreement constituted a nontaxable division of property. As the Court of Appeals stated at page 212 of 412 F.2d:

> It is contended that when the Court in Davis discussed such factors as right of control, descendable interest and the like, federal criteria were established that must be met before the rights conferred by state law can be said to constitute co-ownership. The language of Davis will not support that interpretation. The Court merely discussed certain general characteristics of co-ownership in an attempt to determine whether the wife possessed the rights of a co-owner under state law. In so doing, the Court determined that

> "regardless of the tags, Delaware seems only to place a burden on the husband's property rather than to make the wife a part owner thereof." 370 U.S. at 70, 82 S.Ct. at 1193. Collins v. Oklahoma Tax Commission proclaims that in Oklahoma the wife is made "a part owner thereof," consequently, there is no need to search state law for indications of other factors that might signify the nature of the wife's property interest.
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> In sum, we look to the law of the state, as the Supreme Court did in Davis and as this court did in Pulliam v. C. I. R., 329 F.2d 97 (1964), and conclude that the transfer of stock was a nontaxable division of property between co-owners.

In my view the majority applies an erroneous interpretation of Davis, supra, which was specifically rejected by the Court of Appeals as set forth above.

The application of state law involves a concept known as "jointly acquired property." Briefly the concept may be described as a property right created by divorce statutes in both spouses to property or the enhancement in the

value of property brought about by the joint industry of the husband and wife during their marriage. If property is found to be jointly acquired property, it is immaterial in whose name any of the property is held at the time it is divided by the divorce court. In granting a divorce the jointly acquired property concept requires the court to recognize three classes of property which must be divided: his property, her property and their property, regardless of title. Only three states have statutes providing for the division of jointly acquired property upon divorce--Oklahoma, Kansas and Minnesota.

The instant case involves the transfer of corporate stocks from petitioner to his former wife in recognition of her interest in jointly acquired property under Kansas law. Petitioner and his former wife agreed in their property settlement agreement that they would divide the

total of all the property in half in recognition of their respective jointly held property interests, regardless of title. This being the fact and not subject to dispute because the instant case was fully stipulated, the opinion of the majority at pages 17 and 18 of its opinion confuses title with the concept of jointly acquired property. A division of property must necessarily involve the transfer of title from one spouse to another. This is even true in the division of property pursuant to a divorce in a community property state.

I believe further that the majority has misinterpreted Kansas law. The Oklahoma statute which the Court of Appeals interpreted in Collins, supra, had its origin in Kansas and the statutes of both states were identical until 1964. The landmark case of the Supreme Court of Kansas describing the concept of the wife's property interest in a divorce proceeding is Putnam

v. Putnam, 104 Kan. 47, 177 Pac. 838 (1919). In that case the husband attempted to convince the court in a divorce action that the wife had no property interest in property acquired by joint industry during coverture to which the Supreme Court replied at page 840 of 177 Pac.:

> But a wife has certain rights and interests in property acquired by the husband during the existence of the marriage relation which, with the aid of the statute, the courts upon proper occasion will recognize and protect. Without such statute these rights of the wife would be imperfect and unenforceable, but they would morally exist nevertheless, and they only need such statute to give them legal vitality. * * *
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> * * * In pioneer times the family usually commenced life with little or no property. Land was cheap and easily acquired. The combined efforts and economies of the husband and wife for a long stretch of years usually resulted in prosperity, in the accumulation of the familiar forms of Kansas property. During the years of mutual industry, self-denial, and domestic harmony of the married couple, it would not ordinarily be important whether each succeeding

> tract of land or other property acquired by their joint efforts was taken in the name of the husband or wife. If they lived together happily both would enjoy the property, and upon the death of one of them, the other's half interest would completely mature, and the statute of wills and of descents and distributions would protect it. If their marital partnership--for the joint accumulations of property by a husband and wife are slightly analogous to that of a partnership --is wrecked by marital discord and their troubles become the concern of a divorce court, the court may equitably divide the property accumulated during the marriage relation. * * *

The Supreme Court of Kansas has continued to recognize the concept of the wife's interest in jointly acquired property and has set her property apart to her in a divorce action even though it refused to grant a divorce. Perkins v. Perkins, 154 Kan. 73, 114 P.2d 804 (1941); Zeller v. Zeller, 195 Kan. 452, 407 P.2d 478 (1965).

The concept of jointly acquired property is deeply imbedded in the divorce law of Kansas and

is probably best described in the more recent opinion of the Supreme Court of Kansas in Garver v. Garver, 184 Kan. 145, 334 P.2d 408 (1959). The following quotations from that opinion most aptly describe the nature of such property interest:

> We are of the opinion that alimony and property division are completely separate and that a wife who prevails in a divorce action is entitled to both alimony and division of property. The right to alimony is separate and distinct from the right to division of the property jointly acquired by the parties during the marriage. The doctrine of alimony is based upon the common law obligation of the husband to support his wife, which obligation is not removed by her obtaining a divorce for his misconduct. Division of property, on the other hand, has for its basis the wife's right to a just and equitable share of that property which has been accumulated by the parties as a result of their joint efforts during the years of the marriage to serve their mutual needs. In this sense, the marital relationship is somewhat analogous to a partnership, and when the relationship is dissolved the jointly acquired property must be divided, regardless of which party has been at fault

(Putnam v. Putnam, 104 Kan. 47, 177 P.838). The distinction between alimony and property division has long been recognized in this jurisdiction. * * * [p. 410]

In Cummings v. Cummings, 138 Kan. 359, 361, 362, 26 P.2d 440, 442, the court said:

> The law of this state recognizes that a wife has an interest in property accumulated by husband and wife while the marriage relation existed. The interest is distinct from alimony. Hardesty v. Hardesty, 115 Kan. 192, 222 P. 102; Hendricks v. Hendricks, 136 Kan. 69, 12 P.(2d) 804. Alimony has for its basis right to maintenance only. Division of property has for its basis right to a just and equitable share of property. Bowers v. Bowers, 70 Kan. 164, 167, 78 P. 430. [p. 411]

* * * * * * *

It is clear to us that when a divorce is granted the wife for the fault of the husband she is entitled to three things: (1) restoration of <u>all</u> the property owned by her prior to the marriage or acquired by her in her own right after the marriage, (2) such alimony as the court shall deem reasonable, and (3) a division of the property acquired jointly by the parties during the marriage.

> While the mentioned statute is not a model of clarity, it is apparent the legislature intended that the sentence dealing with division of jointly acquired property apply both to cases where the divorce is granted the wife for the fault of the husband and to cases where the husband is granted the divorce for the fault of the wife. A contrary conclusion would put a premium on the misconduct of the wife. It would mean that property acquired as a result of the joint efforts of the partners in marriage would be retained by the husband where his misconduct resulted in a divorce, while the property would be equitably divided between the parties where the wife's misconduct led to divorce. Such a conclusion cannot be justified in theory or in reason. * * * [pp. 411-412.]

I conclude, therefore, that Kansas statutory and case law as it existed in 1963 was no different from the Oklahoma law which compelled the Court of Appeals to hold the division of jointly acquired property to be nontaxable. Collins v. Commissioner, 412 F.2d 211 (C.A. 10, 1969).

In 1963 Kansas amended its civil code which included a change in its section on division of property in a divorce proceeding. The

divorce court is no longer required to set aside the wife's separate property to her but now such property is subject to division by the court as is the jointly acquired property. This change which became effective on January 1, 1964, is embodied in Kansas Stat. Ann., section 60-1610(b) (Supp. 1971) and is reproduced in full at page 12 of the majority opinion. The code, as amended, applies to the instant case.

In my view, the change in Kansas law does not affect the property concept of jointly acquired property which existed before the amendment.

The similarity of the Oklahoma law and the Kansas law was recognized when the Court of Appeals first decided Collins v. Commissioner, 388 F.2d 353 (C.A. 10, 1968). See Huff, "Federal Income Tax - Divorce Property Division as Taxable Disposition," 37 J.B.A.K. 45

The Supreme Court of Kansas, in comparing

the former statute (which was identical to that of Oklahoma) and the statute as revised in 1964 stated:

> The significant change in the law regarding division of property is that the court is no longer required to set aside to the wife the separate property which she brought to the marriage or acquired with her own funds after the marriage. The court now is given authority to divide all of the property owned by the parties, regardless of the source or manner in which acquired, in a just and reasonable manner.

Zeller v. Zeller, supra, at 484 of 407 P.2d.

The amendment to the statute was for the purpose of enlarging the trial court's power to divide the property of the spouses. Harrah v. Harrah, 196 Kan. 142, 409 P.2d 1007 (1966). I conclude, therefore, that under Kansas law when the petitioner transferred the stocks to his former wife, it was a division of their jointly acquired property and was, therefore, nontaxable.

Because I would hold the transfer to be nontaxable it is not necessary to comment upon the

valuation issue.

FAY and FEATHERSTON, JJ., agree with this dissent.

JULY TERM - July 25, 1974

Before The Honorable David T. Lewis, Chief Judge, The Honorable John C. Pickett, The Honorable Jean S. Breitenstein, The Honorable Delmas C. Hill, The Honorable Oliver Seth, The Honorable William J. Holloway, Jr., The Honorable Robert H. Mc Williams, The Honorable James E. Barrett, and The Honorable William E. Doyle, Circuit Judges

RICHARD E. WILES, JR., and KAREN B. WILES,	)	
Petitioners-Appellants,	)	
vs.	)	No. 73-1677
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent-Appellee.	)	

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing en banc filed by the appellants in the captioned case.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges Pickett, Breitenstein, and Barrett, to whom the cases were argued and submitted.

The petition for rehearing having been denied by the original panel to whom the cases were argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

STATUTES

Title 26 United States Code Annotated (Internal Revenue Code of 1954):

SEC. 1001. DETERMINATION OF AMOUNT OF AND RECOGNITION OF GAIN OR LOSS.

(a) Computation of Gain or Loss. --The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 1011 for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

(b) Amount Realized. --The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received. In determining the amount realized--

(1) there shall not be taken into account any amount received as reimbursement for real property taxes which are treated under section 164(d) as imposed on the purchaser, and

(2) there shall be taken into account amounts representing real property taxes which are treated u under section 164(d) as imposed on the taxpayer if such taxes are to be paid by the purchaser.

(c) Recognition of Gain or Loss. --In the case of a sale or exchange or property,

the extent to which the gain or loss determined under this section shall be recognized for purposes of this subtitle shall be determined under section 1002.

* * *

SEC. 1002. RECOGNITION OF GAIN OR LOSS.

Except as otherwise provided in this subtitle, on the sale or exchange of property the entire amount of the gain or loss, determined under section 1001, shall be recognized.

Kansas Statutes Annotated:

60-1610. Decree. A decree in an action under this article may include orders on the following matters:

* * *

(b) Division of Property. The decree shall divide the real and personal property of the parties, whether owned by either spouse prior to marriage, acquired by either spouse in his or her own right after marriage, or acquired by their joint efforts, in a just and reasonable manner, either by a division of the property in kind, or by setting the same or a part thereof over to one of the spouses and requiring either to pay such sum as may be just and proper, or by ordering a sale of the same under such conditions as the court may prescribe and dividing the proceeds of such sale.

(c) Maintenance. The decree may award to either party an allowance for future support denominated as alimony, in such amount as the court shall find to be fair, just and equitable under all of the circumstances. The decree

may make the future payments conditional or terminal under circumstances prescribed therein. The allowance may be in a lump sum or in periodic payments or on a percentage of earnings or on any other basis. At any time, on a hearing with reasonable notice to the party affected, the court may modify the amounts or other conditions for the payment of any portion of the alimony originally awarded that have not already become due, but no modification shall be made, without the consent of the party liable for the alimony, if it has the effect of increasing or accelerating the liability for the unpaid alimony beyond what was prescribed in the original decree.

(d) Separation agreement. If the parties have entered into a separtion agreement which the court finds to be valid, just, and equitable, it shall be incorporated in the decree; and the provisions thereof on all matters settled thereby shall be confirmed in the decree except that any provisions for the custody, support, or education of the minor children shall be subject to the control of the court in accordance with all other provisions of this article. Matters, settled by such an agreement, other than matters pertaining to the custody, support, or education of the minor children, shall not be subject to subsequent modification by the court except as the agreement itself may prescribe or the parties may subsequently consent.

* * *

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

RAY C. IMEL, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	CIVIL ACTION NO. C-3264

Rothgerber, Appel and Powers, by Ira C Rothgerber, Jr., Attorney at law, Denver, Colorado, for Plaintiff; Fred B. Ugast, Acting Assisting Attorney General, Stanley F. Krysa and Stephen J. Swift, Attorneys at law, Department of Justice, Washington, D.C. and James L. Treece, United States Attorney, Denver, Colorado, for Defendant.

MEMORANDUM OPINION

The Colorado Supreme Court answered the certified questions in Re Questions Submitted by the United States District Court for the District of Colorado Concerning C.R.S. 1963, 46-1-5 and 1971 Perm Supp. C.R.S. 1963, 46-1-13 in Civil Action No. 26089 entitled Ray C. Imel v. United States of America, (1974) ___ Colo.___, ___ P. 2d ____. The Court answered:

> "We hold that at the time the divorce action was filed there vested in the wife her interest in the property in the name of the husband. . . . We answer in the affirmative that, under Colorado law, the transfer involved here was a recognition of a 'species of common ownership' of the marital estate resembling a division of property between co-owners. We answer in the negative whether the transfer more closely resembles a conveyance by the husband for the release of an independent obligation owed by him to the wife. . . . (A)t the time of the filing of the dissolution action in which the division of property will be later determined, a vesting takes place. This interest which has vested is inchoate only in the sense that, prior to the division,

> the property to be transferred to the wife has not yet been determined. Upon and after the filing of the action, the rights of the wife are analagous to those of a wife who can establish a resulting trust, irrespective of a divorce action, in the property of the husband. We use this analogy because we are not saying that after the filing of the divorce action it is necessary for both spouses to enter into the conveyance of property held in the name of only one. Upon the filing of the action the court may protect this vested interest of the wife pending the division order, even though the property to be transferred to her has not as yet been determined." [Emphasis added]

After receipt of the opinion of the Colorado Supreme Court, the government asked and was granted leave to file a brief in which it argued that despite the Colorado Court's pronouncement of Colorado law, the capital gains tax paid by Imel was due and owed. As in the last analysis it must, the government begrudgingly conceded at time of oral argument of its brief that what it here really seeks is to have the United States Court of Appeals for the Tenth Circuit overrule

Collins #4 instead of modifying Pulliam to comport with Collins #4 and now settled Colorado law.

The government argues that United States v. Davis (1962) 370 U.S. 65, proclaims a policy which requires imposition of the tax, but to adopt this argument would require us to shut our eyes to Collins v. Commissioner of Internal Revenue (1968) 393 U.S. 215 [Collins #3] and to Collins v. Commissioner of Internal Revenue (1969) 10 Cir. 412 F. 2d 211 [Collins #4]. As Judge Hill said:

> "Having the benefit of an interpretation of state law on this very point, we must conclude that the stock transfer operated merely to finalize the extent of the wife's vested interest in property she and her husband held under a 'species of common ownership.'"

United States v. Davis holds no more than that state law must be consulted to determine whether the divorce-forced transfer is in recognition of property rights or whether it is to obtain a release of an independent obligation. The Colorado Supreme Court has held that under Colorado

law it is the former rather than the latter.

Next, the government argues that the Colorado Supreme Court doesn't really understand Colorado law, and, in any event, "Since the opinion of the Colorado Supreme Court in this instance is advisory only, this court is not bound by the opinion." We disagree, and remain firmly convinced that Colorado Supreme Court Decisions constitute the last word on Colorado law. In fairness to the government, its contention was advanced before the decision in Lehman Brothers v. Schein, (1974) _____ U.S. _____, 42 L.W. 4603, which is in accord with earlier lower court cases passing upon the effect of decisions rendered under a certification procedure. National Education Association v. Lee County Board of Public Instruction (1972) 5 Cir. 467 F. 2d 447, Allen v. Estate of Carman (1973) 5 Cir. 486 F. 2d 490. The manifest attractions of state court certification rules would be destroyed if it were to be

held that a federal court will accept determinations of state law only when it suits the federal court's pleasure, and our utilization of the rule was to obtain a binding -- not an advisory -- opinion from the Colorado Supreme Court.

Then, says the government, for some obscure reason, the fact that husband and wife might reconcile after the filing of a divorce action means that there can't really be any vesting of a property interest in the wife until the decree enters. The government's argument is difficult to follow, but it seems to ignore the fact that vesting and revesting have long been known to the common law which recognizes base, conditional or determinable fees and possibilities of reverter. See, 26 C.J.S., Deeds, §110, p. 920, and 28 Am. Jur. 2d Estates, §182, p. 319. Determinable fees and possibilities of reverter are a part of Colorado law, City of Idaho Springs v. Golden Savings and Loan Association,

(1971) 29 Colo. A. 119, 480 P. 2d 847, and so are resulting trusts, Thuet v. Thuet, (1953) 128 Colo. 54, 260 P. 2d 604, U.S. National Bank v. Bartges, (1950) 120 Colo. 317, 210 Pl 2d 600.

Finally, perhaps in the interests of chivalry, the government pleads that to hold that the husband doesn't owe the tax might possibly result in a future tax obligation on the part of the wife for the accrued capital gain if she later sells the property, the interest in which she earned during the marriage. In addition to the chivalrous motivation, unless the husband is taxed now, there is the strong probability in this case that the property will not be sold by the wife, and no one will ever owe any capital gains tax -- an eventuality viscerally abhorrent to any dedicated tax collector. This claimed tax liability would not exist in Oklahoma under Collins #4; it would not exist in any community property state, and no tax is due under Davis

when the transfer is not in consideration of the release of an independent obligation. Moreover, absent the marital splitup, if the parties held the property until death, an estate tax would have been owed, but there would be no capital gains tax. The government's chivalry is muted by its insistence on a present tax bite claimed only because of the Imels' domestic problems, and we reject the government's paternal assertation that it wants to collect a tax only because of its desire to protect the wife rather than admit to a valiant last ditch effort to collect a capital gains tax when, under Colorado law, there has been no taxable event.

Even with Pulliam v. Commissioner of Internal Revenue in mind, I think that Davis and Collins #4, when coupled with the Colorado Supreme Court's answers to the certified questions, mandate that judgment here enter in favor of plaintiff, and it shall so enter. Plaintiff's

counsel are directed to submit a form of judgment within 10 days of the date of this opinion.

Dated at Denver, Colorado, this 9th day of May, 1974.

/s/ Fred M. Winner
United States District Judge

CERTIFICATE OF SERVICE

It is hereby certified that service of this petition has been made upon Respondent, Commissioner of Internal Revenue, by mailing three copies thereof on this day of August 1974, in an envelope, with air mail postage prepaid, properly addressed to him as follows:

Commissioner of Internal Revenue
1111 Constitution Avenue N.W.
Washington, D. C. 20224

and by mailing three copies thereof to Respondent's attorney of record in this case in the United States Court of Appeals, Tenth Circuit on this day of August 1974, in an envelope, with air mail postage prepaid, properly addressed to him as follows:

Scott P. Crampton, Esquire
Assistant Attorney General
Tax Division
United States Department of Justice
Washington, D. C. 20530

It is hereby further certified that service of this petition has been made upon the Solicitor General of the United States by mailing three copies thereof on this day of August 1974, in an envelope, with air mail postage prepaid, properly addressed to him as follows:

Solicitor General
Department of Justice
Washington, D. C. 20530

_____
John H. Foard, Sr.
Attorney for Petitioners